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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 42.

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; VICTOR YERMALOFF, and Others.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

BRIEF ON BEHALF OF FREDERICK H. CATTLEY, *ET AL.*, BRITISH SHAREHOLDERS IN THE FIRST RUSSIAN INSURANCE COMPANY, AS *AMICI CURIAE*.

ALBERT G. AVERY,
Attorney for Frederick H. Cattley, et al., British Shareholders in the First Russian Insurance Company, as Amici Curiae.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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This brief is submitted on behalf of the British shareholders of the First Russian Insurance Company as *amici curiae* pursuant to agreement of the parties herein executed May 9, 1941, and duly filed. In a prior brief, similarly filed, these shareholders asked that the petition for certiorari herein be dismissed or denied on the grounds: (1) that there was no conflict between the decision below (284 N. Y. 555) and *United States* v. *Belmont*, 301 U. S. 324; (2) that even if such conflict existed it was necessarily resolved by the subsequent decision in *Moscow Fire Ins. Co.* v. *Bank of New York & Tr. Co.*, 309 U. S. 624, 697; (3) that the decision below was based upon an independent and adequate non-federal ground, namely the lack of extra-territorial

effect, under local New York law, of the Soviet decrees under which petitioner sued as assignee; (4) that no valid reason did or could exist for a relitigation of the admittedly identical question involved, decided and set at rest by the *Moscow* case, *supra*.

In the alternative the shareholders requested that if certiorari be granted, the judgment below should be affirmed upon the authority of the *Moscow* case (161 Misc. 905; 253 App. Div. 644; 280 N. Y. 286, 848; 308 U. S. 542, 309 U. S. 624, 697).

The contentions advanced in the shareholders' earlier brief consequently will not be restated here but are respectfully urged in support of an affirmance of the judgment.

Summary Statement of the Matter Involved.

Petitioner, by its complaint herein seeks in substance outright confiscation of $1,335,653.73, representing the surplus assets of the First Russian Insurance Company remaining now in possession of the New York Superintendent of Insurance after payment of all domestic creditors. That complaint has been duly dismissed by all the New York courts (R., 52; 259 App. Div. 871, 284 N. Y. 555) upon the Superintendent's motion for summary judgment, made on affidavits under the New York practice (C. P. R. 113), wherein it was established without dispute that the complaint was predicated upon the *identical* Soviet decrees which had previously been construed in the *Moscow* case to be without extra-territorial effect and not to embrace the assets of a nationalized Russian insurance company deposited in New York with a local trustee in accordance with applicable local law and which were in the process of liquidation under the lawful custody and supervision of the New York Supreme Court. This was plainly all a matter

of local law duly asserted in accordance with permissive local procedure and presented no federal or novel question when raised again herein. Consequently there remained no alternative but to dismiss the complaint since the state courts were bound by their prior decisions as to the scope and effect of these identical decrees which have been exhaustively litigated for six years in the *Moscow* case and by the findings made in that litigation of which they had full judicial knowledge and notice as a part of their own official records.

In seeking certiorari, petitioner asserted the judgment of dismissal by the highest state court, entered on the summary judgment motion, conflicted with *United States* v. *Belmont*, 301 U. S. 324, which, it was claimed, validated in this country the aforesaid Soviet decrees of confiscation; secondly, that the decision below did not rest upon any independent and adequate non-federal ground.

These shareholders contended, in opposition to certiorari, that the *Belmont* case had previously been distinguished correctly by the New York Court of Appeals in the *Moscow* case (280 N. Y. 286, 308-9) as merely involving the sufficiency of a pleading, the allegations of which had been expressly admitted by demurrer and which "in no wise support the appellant's contention here, where we are considering whether title to property in the custody of this State has been transferred *in invitum* from its owner to the Soviet government or is 'dependent' upon the law of Russia" (*Id.* at pp. 308-9). That decision was duly affirmed by this Court (309 U. S. 624), rehearing was unanimously denied by this Court (309 U. S. 697) and as the state court of last resort has held in the present case (284 N. Y. 555, 556):

> "The decision left open no question which has been argued upon this appeal."

Indeed in the present case, the allegations of the moving affidavit on the summary judgment motion that the identical Soviet decrees were involved in both cases were wholly uncontested; this being so, under the state practice, the allegations of the complaint could not be adverted to as proof in opposition to the motion, it was in effect wholly unopposed and there was no alternative but to grant summary judgment dismissing the complaint on the merits (*Gnozzo* v. *Marine Tr. Co. of Buffalo*, 258 App. Div. 298; aff'd. 284 N. Y. 617).

Secondly, these shareholders contended that the state court decision (which admittedly adopted and readhered to the *Moscow* decision) was plainly bottomed upon an independent and adequate non-federal ground, viz. the inapplicability under Russian law of the Soviet decrees to the New York assets in suit. Dismissal or denial of certiorari was accordingly requested—or in the alternative it was asked that certiorari be granted and the judgment affirmed under the authority of the decision in the *Moscow* case.

Petitioner, having secured certiorari, has now departed radically from the limited grounds urged in its petition. Realizing that an adjudication of its alleged title as assignee is not possible upon a record which discloses only an unopposed motion for summary judgment, petitioner now advances the new and startling proposition that the decision of the state court of last resort in the *Moscow* case (which admittedly controlled the decision below in the present case) was, despite its express language, in reality bottomed upon the wholesome public policy of New York which condemns confiscation; that such likewise was our national public policy for fifteen years (in fact since the founding of the union) but that all this was overturned in 1933 by the action of the President in procuring for the United States an assignment of the rights of the U. S. S. R., if any, under

the Soviet confiscatory decrees by virtue of the so-called Litvinoff assignment.

From this extraordinary contention it is then boldly suggested that these surplus funds might conceivably be *res nullius* unless covered into the public treasury under this new and alien doctrine of confiscation; that the Presidential action in accepting the assignment constituted a recognition of this abhorrent doctrine which this Court is powerless to impugn; that consequently the claims of these shareholders who were invited to deposit their funds in this country for legitimate business purposes "would seem to be invalid" and that unless petitioner's right to claim the entire fund be sustained (despite all the aforesaid contrary adjudications) the fund "would in principle go to the State of New York by way of escheat": although no such claim has been or could be asserted in view of our Constitutional guaranties, the settled public policy of state and nation and indeed every usage of civilization.

This in substance is the petitioner's claim. To these British shareholders, our friendly allies in the present struggle of democracy, who have been guaranteed the protection of their property by the Constitution of the United States (*Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489; *Hines* v. *Davidowitz*, 312 U. S. 52, 65) and who long ago were duly invited by the New York court of last resort to come in and claim their own property[1] (*Matter of People*

[1] The New York Court of Appeals has found that the First Russian Insurance Company has 10,000 shares issued and outstanding (255 N. Y. 415, 426) and that the surplus, after payment of creditors should be disposed by the surviving directors "in ways that will be just and equitable to all the interests affected" (*id.*). It has held that such surplus in the cases of nationalized Russian insurance companies should pass "to the stockholders and foreign creditors who, in answer to an invitation extended to them by the State, have come in and proven their claims in accordance with a procedure devised by this court to 'conform to justice and equity' as these terms are understood here" (*Moscow Fire Ins. Co.* v. *Bank of N. Y. & Tr. Co.*, 280 N. Y. 286, 314).

(*First Russian Ins. Co.*), 255 N. Y. 415, 426), it is unthinkable that this Court, to whom is entrusted the protection of all Constitutional liberties, would countenance such claim. We propose to meet it squarely, now that the direct challenge has been thrown down (Petrs. main brief, pp. 9-11).

Summary of Argument.

1. The decision below did not deny effect to the Soviet decrees because of a state (or national) policy against confiscation, but because even under Soviet law such decrees were without extra-territorial effect and did not embrace the property in question.

2. The *Belmont* case had nothing to do with this question which involves no question of our foreign relations or national foreign policy.

3. The independent and adequate non-federal ground upon which the decision below rested was that the Soviet decrees did not reach the assets in New York as a matter of foreign law (or fact), not upon the theory that the funds were held in New York by a separate juristic entity, but notwithstanding, the funds did constitute such entity under New York law, the state law on this subject is binding here and presents no reviewable federal question.

4. Confiscation has been and is abhorrent to our state and national public policy and to the laws and usages of civilized nations generally, even as respects the property of enemy aliens. This surplus is the property of friendly alien shareholders and is guaranteed protection by the Fifth and Fourteenth Amendments to the Constitution of the United States.

The decision below was not predicated upon a state policy against confiscation, but had it been, such policy accords with our national policy as respects the private property of friendly allies situated here.

Petitioner contends the decision in the *Moscow* case (which was incorporated as the decision below) "must have been" that New York will not give effect to any transfer of rights "under the Soviet decrees because of their confiscatory character". This is of course demonstrably untrue for New York, subsequent to recognition of Soviet Russia, has expressly accorded due effect to the Soviet confiscatory decrees as applied to property located and contracts made in Russia (*Salimoff* v. *Standard Oil Co. of N. Y.*, 262 N. Y. 220; *Dougherty* v. *Equitable Life Assur. Soc.*, 266 N. Y. 71). But it has properly refused to extend such decrees to assets in the lawful custody of New York courts, not because of any public policy—*but because, as a matter of fact such decrees do not in fact reach such property* (*Moscow Fire Ins. Co.* v. *Bank of N. Y. & Tr. Co.*, 280 N. Y. 286). The decision in the *Moscow* case was statedly

> "Not because enforcement of confiscatory decrees of property situated elsewhere is contrary to our public policy, but because under the law of this state such confiscatory decrees do not affect the property claimed here" (280 N. Y. 286 at p. 314).

This is made abundantly clear when the findings which were made and affirmed concerning these decrees are reexamined. The state trial court found as findings of fact[2]

[2] See Record in 309 U. S. 624 at R. 114-15.

that by subsequent Soviet decrees taking effect as of January 1, 1923 "the effect of the nationalization decrees passed prior to 1921, including the decree providing for the nationalization of insurance enterprises, was modified so as to apply only to such private property as was factually in the possession of the Soviet government or organized toilers prior to May 22, 1922;" that pursuant to such Soviet legislation "private property not factually in the possession of or in the inventories of the Soviet government, its agents or representatives, was, pursuant to the decision of the highest Soviet courts, actually returned to its former owners."

Here it is undisputed that the property in question has never been factually in possession of the Soviet authorities or in their inventories at all. On the contrary it remained as a separate juristic entity in New York conducting an active insurance business there in conformity to New York law from 1918 to 1925 when liquidation of such entity under state law was begun by the New York Superintendent of Insurance who has since been in lawful possession as liquidator. The state court found it is the law of Soviet Russia "that the ownership of property is to be determined by the law of the place where the property is located" (*i. e.*, the law of the State of New York); that the confiscatory decree of November 28, 1918 "did not purport or intend to vest the Soviet State with title to any assets outside of Russia of nationalized Russian Insurance Companies"; that the Soviet government *never* claimed exterritorial effect for any of its nationalization decrees (excepting those relating to the Russian Merchant Marine) and that an oral expert opinion to the contrary was "without support in

the evidence and is contrary to the documentary evidence herein."[3]

Petitioner seeks to escape all this by stating in its brief (p. 9) that "although * * * the complaint prays that all assets remaining in the hands of respondent after the payment of domestic creditors be turned over to the United States, the only relief presently sought is that the United States be recognized as the successor to the title and interest of the First Russian Insurance Company." But petitioner admits (p. 10, n. 2) the rights of foreign creditors have been annulled by the state court decisions in *Dougherty* v. *Equitable Life Assurance Co.*, 266 N. Y. 71 (Cf. also *Dougherty* v. *Nat. City Bank*, 167 Misc. 849; *Tillman* v. *Nat. City Bank*, 118 F. (2d) 631, cert. den. 314 U. S. ....., No. 293 Oct. term 1941) so this is merely a circuitous means of asserting the claim that the residuary property interest of friendly allied shareholders which has its situs here and which enjoys our Constitutional guaranty against confiscation may be wholly destroyed. Certainly in the absence of confiscation petitioner is not the successor to the claims of these shareholders to whom these surplus funds belong under the doctrine of the *Moscow* case *supra* (280 N. Y. 286, 309 U. S. 624, 697) which has since been followed in *Moscow Fire Ins. Co.* v. *Heckscher & Gottlieb*, 260 App. Div. 646, 285 N. Y. mem. 162 and by the state courts below (284 N. Y. 555) years after the decision in the *Dougherty* case *supra*. These shareholders were not impleaded in this action, consequently no decision recognizing the petitioner as the successor to their title and interest could be sus-

[3] Under the state law which controls on all non-federal questions, the oral opinions of experts on Russian law may be wholly disregarded when, as here, contrary to the plain text of the applicable Russian laws, decrees and decisions (Cardozo, C. J. in *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23, 34; *Dougherty* v. *Equitable Life Assur. Soc.*, 266 N. Y. 71; *Moscow Fire Ins. Co.* v. *Bank of N. Y. & Tr. Co.*, 280 N. Y. 286, 306).

tained except upon the basis of a naked confiscation of their property, however artfully this end may be camouflaged.

Petitioner then contends (pp. 78-84) that the scope of the Soviet decrees and their lack of extra-territorial effect is still open because only questions of law were decided by the state court below (284 N. Y. 555); that this issue was not raised on the summary judgment motion and that the scope of the Soviet decrees raises alleged "issues of fact" which could not have been lawfully determined[4] on a motion for summary judgment. Petitioner then curiously argues that the state courts should have blinded themselves to their own official records[5] in the *Moscow* case (despite the fact that C. P. R. 113 expressly permits the case of such official record on a summary judgment motion) and that similarly this Court must blind itself to what its own official docket reveals in the *Moscow* case as to the scope of such decrees and again redetermine what has heretofore been set at rest by affirmance of the *Moscow* decision, although elsewhere petitioner argues (by reference to the *briefs* in the *Moscow* case) that this Court has power to determine the scope of such Soviet decrees independently of the state court's decision below and to reach a contrary conclusion on matters that are said to be purely factual.

All this presents no new federal question—whether the summary judgment motion was proper in form and correctly granted on the record made was and is a matter of local law only on which the two state courts of appeal have expressed their unanimous concurrence with the state Supreme Court decision (R. 52; 259 App. Div. 871; 284 N. Y.

[4] But the very purpose of summary judgment is to determine in advance of trial if there is a genuine fact issue. Here the state courts have determined there is none.

[5] *Cf.* Rules 1001-6 of the proposed Code of Evidence of the American Law Institute (27 A. B. A. Journal 744-5, December, 1941).

555). No rehearing or certificate was asked for in the state court of last resort; no mention of any claim that the procedure adopted below violated the state practice on a motion for summary judgment consequently was or could be asserted as a federal question in the petition for certiorari.

The truth of the matter is that the summary judgment motion was in reality wholly uncontested in the state court; respondent moved on affidavit setting up that the Soviet decrees relied on in the complaint were identical with those construed in the *Moscow* case; this was expressly *admitted* in petitioner's only opposing affidavit which asked only that the motion be stayed pending final decision in the *Moscow* case, and consequently the bare unsupported conclusions in the complaint as to the effect of these decrees could not be adverted to as proof in order to oppose the motion (*Gnozzo* v. *Marine Tr. Co.*, 258 App. Div. 298, aff'd 284 N. Y. 617). Since the motion was in effect unopposed and in view of petitioner's admissions (then and now) of the identity of the Soviet decrees and their construction in this case and the *Moscow* case, the state courts here plainly had no choice but to follow the *Moscow* decision under the doctrine of *stare decisis*. There was no question as petitioner contends of a "mass of (conflicting) testimony" in the *Moscow* case as the "official record" which was relied upon on the summary judgment motion for, as abundantly appears from the *Moscow* decision, *supra*, it was based upon the unimpeachable documentary evidence of other Soviet decrees issued in 1921 and thereafter reenacted in substance in the Soviet Civil Code of 1922 (effective January 1, 1923) which modified the brutal policy of the prior nationalization decrees and expressly limited their scope "only to such private property as was factually in the possession of the

Soviet Government or organized toilers prior to May 22, 1922"; in other words, where actual physical confiscation had not been factually accomplished prior to 1922 it was by the official published decrees and laws of Soviet Russia thereafter invalidated. Pursuant to these decrees of modification, private property was thereafter *actually returned to its owners* by the Soviet Government officials. The Soviet decrees of October 27, and December 10, 1921 which expressly prohibited such further confiscation of private property not theretofore physically seized, both the Peoples Commissar of Justice and the Supreme Court of the R. S. F. S. R., the highest court in all Soviet Russia, had held in subsequently published decisions, established that such properties "are recognized factually not nationalized and are deemed 'belonging to their former possessors' (that is, former owners)" (309 U. S. 624, Record, pp. 1961-1963). Indeed, as to property in the United States, the Soviet Commissariat of Justice had ruled the general annulment of life insurance agreements "does not extend to the territories located without the borders of the U. S. S. R. and particularly to the United States of North America." (309 U. S. 624, Record, at p. 856).

All the oral expert testimony possible could not overcome these published Soviet counter decrees ending the confiscatory policy of nationalization as to property not yet physically seized, the conceded fact of the subsequent restoration of private property by Soviet officials and the published decisions of the highest Soviet legal authorities construing these counter decrees of 1921 (which became a part of the Soviet Civil Code in 1922) in accordance with their plain language as ending the confiscatory policy promulgated as a military measure in the early days when the new revolutionary Russian government was

seeking to establish itself in power. Consequently, the New York state court of last resort properly concluded, in accordance with governing principles of applicable state law, to reject and discard the contrary oral opinions of interested experts, to examine for itself the context of these Soviet decrees, laws and decisions and to conclude, as had the highest Soviet courts, that they meant exactly what they said and that they amply supported the state court findings which determined (1) the nationalization decrees in question had no extra-territorial effect as applied to property in the United States of North America, and (2) that they had been effectively repealed by 1923 as to unseized property by the subsequent 1921 decrees and the 1922 Civil Code (*Moscow Fire Ins. Co.* v. *Bank of N. Y. & Tr. Co.*, 280 N. Y. 286, at 306; *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23, 34). In the *Petrogradsky Bank* case, Mr. Justice Cardozo said:

> "The mere opinion of a witness will not control the judgment of a judge in regard to foreign law except to the extent that it is a reasonable inference from statute or from precedent or from the implications of a legal concept, such as a contract or testament or juristic personality (*Eastern Bldg. & Loan Assn.* v. *Williamson*, 189 U. S. 122, 127; *Finney* v. *Gay*, 189 U. S. 335, 342; *Bank of China, etc.* v. *Morse*, 168 N. Y. 458, 470; *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127, 138, 139). Unless it is this, the judge must use his own judgment and find the meaning of the foreign law as he would if the meaning to be ascertained were that of a deed or an agreement. *This is as true upon appeal as it is upon a trial.*"

There was therefore before the state court in granting summary judgment: (1) petitioner's express admissions that the 1918 Soviet decrees specified in the complaint were

the identical decrees adjudicated in the *Moscow* case; (2) the admission that the *Moscow* decision was controlling here; (3) the official records of the Soviet counter decrees of 1921, the Soviet Civil Code and the decisions of the highest Soviet tribunals all holding that nationalization of private property had ceased by 1923 as to such property not then in factual possession of the Soviet authorities; (4) the official record of the *Moscow* case wherein the state court had made findings to this effect based upon this documentary record of the foreign law, its authoritative interpretation and undisputed application; (5) the fact of final affirmance of the decision in the *Moscow* case. There was no alternative but to grant summary judgment under applicable state law and the affirmance of such judgment by the state court of last resort on this matter of state law (no new matter differing from the *Moscow* decision having been presented to it) presented no federal question for review by this Court.

What petitioner now seeks is in reality a rehearing and a reversal by this Court of the *Moscow* decision. But it made one such attempt nearly two years ago and lost by a unanimous decision (309 U. S. 697). One trial of an issue is enough (*Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78).

In the light of the foregoing, petitioner is reduced to the claim that the Lityinoff assignment necessarily must have passed title to these shareholders' private property in New York since the President in accepting it necessarily made an executive determination, not reexaminable here, that it was in the interests of the United States (pp. 28-45). This argument is fallacious on its face, for the petitioner at most acquired only the rights of a common law assignee subject to all the defenses available under the local law wherever it asserted its rights (*United States* v.

Buford, 28 U. S. 12, 30; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126); the assignment concededly was only an incidental part of a general scheme for the recognition of Russia; it did not even reach the dignity of a treaty requiring ratification by the Senate, but if it had, Soviet Russia warranted nothing thereby and if Russia had in fact no title under Soviet law it of course could assign nothing here.

Lastly, this fund is the private property of friendly alien shareholders who are not citizens of Russia. It is not an amount "admitted to be due or that may be found due" Soviet Russia from American nationals, including corporations, companies, partnerships or associations, nor is it a debt due the Soviet regime as successor of prior Governments of Russia or otherwise. This was all that Litvinoff purported to assign on November 16, 1933 and it was all consequently that petitioner could receive under such assignment; the question of whether the assignment was or is beneficial to petitioner in other respects is of no relevancy here. Certainly it could not operate to confiscate and transfer the private property of friendly allies in the absence of a concurrent repeal of the due process clause of the Constitution of the United States.

II.

United States v. *Belmont* does not govern.

We will not repeat again the elementary proposition that a decision on demurrer wherein all the allegations of a complaint are accepted as true for the purposes of the demurrer has no relevancy to a decision on a motion for summary judgment where the moving affidavit is wholly unopposed and under the state practice, which controls, the

complaint cannot even be adverted to in opposition. The *Belmont* case under these circumstances obviously cannot be "conclusive" of any issue here for all it held was that the Litvinoff assignment (for whatever it may be worth) is not open to judicial review and that a cause of action thereunder, based upon the Soviet decrees, was cognizable here on its face, even though it might develop subsequently that the decrees and assignment conveyed absolutely nothing to the assignee. Here it appears beyond possible question from the official records of Soviet Russia, the New York Courts and this Court, as established by the subsequently decided *Moscow* case, that the allegations of the complaint are not in fact true and that the Soviet decrees relied upon do not under Russian law embrace the assets in question. Had the present case come up therefore even on mere demurrer to the complaint (and not on a motion for summary judgment made in lieu of a burdensome trial on this identical issue) it is of course to be assumed that this Court and the state courts would have taken judicial notice of their own records and of the prior decision in the *Moscow* case and sustained such demurrer in view of the now established insufficiency of any such complaint. Prior to the *Moscow* decision, however, there was no official determination here of the scope and effect of the Soviet decrees, consequently it was assumed for purposes of pleading in the *Belmont* case that a cause of action thereon was good; now it is authoritatively established that it is not—at least to the surplus assets here belonging to the friendly shareholders of nationalized Russian insurance companies.

III.

The state court's decisions were not predicated upon the theory of a separate juristic entity in New York but upon the lack of extra-territorial effect of the Soviet decrees; nevertheless such separate juristic entity was in fact established under the local law and no reviewable federal question is presented thereby.

Petitioner has seized upon the portion of the opinion of the state court of last resort in the *Moscow* case which upholds the view that the New York branches of these Russian insurance companies (Moscow Fire Insurance Company and First Russian Insurance Company) were separate juristic entities (or, as petitioner styles the branch of the First Russian company, "the domesticated United States branch", whatever that may mean). The undisputed fact is, of course, that many years ago each company deposited with a New York trustee in accordance with the New York Insurance Law, a separate reserve fund to cover all the domestic policies written by the New York branch which had its own local office functioning independently under a local manager; that such branches were thereafter run under the direct supervision of the New York Superintendent of Insurance pursuant to the New York laws; that they continued to function as completely independent juristic entities for nearly *seven* years (1918-1925), after nationalization and confiscation in Russia in 1918, conducting an insurance business in New York down to August 8, 1925, when each was placed in a local liquidation under the local New York law by the respondent Superintendent of Insurance (255 N. Y. 415); that the residue of the surplus deposit, after payment of valid creditor claims as determined in liquidation proceedings belongs to the corporate shareholders, whose property it is; and that such surplus in the *Moscow* case has already been distributed to the shareholders through the medium of the

sole surviving director and that the New York Court of Appeals has long ago prescribed a like procedure for the First Russian shareholders through the medium of its own surviving directors (255 N. Y. 415, 426).

All this is in accord with the prevailing New York law that such local branches constitute separate juristic personalities or entities wholly independent of and unaffected by the vicissitudes of the offices in Russia and which "must be treated as a domestic insurance company and as domiciled in this state" (*Morgan* v. *Mut. Benefit Life Ins. Co.*, 189 N. Y. 447, 454; *Comey* v. *United Surety Co.*, 217 N. Y. 268, 273-4; *Matter of People (City Eq. Fire Ins. Co.)*, 238 N. Y. 147; *James* v. *Rossia Ins. Co.*, 247 N. Y. 262, 265).[6] This was the view adopted in the *Moscow* case which was affirmed by this Court and unanimously readopted by the New York Court of Appeals in its opinion below (284 N. Y. 555). Petitioner now disagrees with this view and cites voluminous earlier local authorities in an endeavor to show that the dissenting opinion in the *Moscow* case was right and the majority wrong; however, since then the New York Court of Appeals has herein *unanimously* adopted the majority opinion in the *Moscow* case as dispositive of this issue (284 N. Y. 555); to the extent, therefore (if any), that the decision in the *Moscow* case went upon the theory of a separate juristic personality or entity in New York, it represents the authoritative and final pronouncement of the state court of last resort upon a matter purely of local law (involving a construction of New York statutes and New York decisions and which presents no reviewable federal question) in a local field wherein the New York Court of Appeals is the supreme authority and in which this Court will not intrude with contrary views (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64).

[6] See also *Matter of People (Norske Lloyd Ins. Co.)*, 242 N. Y. 148, 158; *Moscow Fire Ins. Co.* v. *Bank of N. Y. & Tr. Co.*, 280 N. Y. 286, 309-10.

IV.

If, as petitioner contends, a new public policy of confiscation of private property is sought herein it cannot be sustained under whatever guise or pretext it may be attempted.

As was said in *Hines v. Davidowitz*, 312 U. S. 52, 65, n. 14:

> "Every state is by the law of Nations compelled to grant aliens at least equality before the law with its citizens, as far as safety of person and property is concerned. An alien must in particular not be wronged in person or property by the officials and courts of a state. 1 Oppenheim: International Law (5th ed. 1937) pp. 547-548. And see 4 Moore: International Law Digest, pp. 2, 27, 28."

"Confiscation is a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times" (*Hanger* v. *Abbott*, 6 Wall. 532, 536). "So degrading an idea will be rejected with disdain by every man who feels a true and well-informed national pride" (7 Hamilton's Works, p. 329) and the exercise of the right is contrary to the practice of civilized nations (Dana: Wheaton on International Law, p. 392). We do not confiscate the goods of the stranger within our gates, even though he be an alien enemy (Cardozo, C. J., in *Techt* v. *Hughes*, 229 N. Y. 222, citing 2 Oppenheim, *supra*, p. 139; Phillimore's Commentaries on International Law (5th ed.) p. 417; Hall: International Law (6th ed.) p. 451; 2 Hyde: International Law, pp. 229, 238. See also Hague Convention of 1907, Art. 23 (h)). Indeed "that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated" (*United States* v. *Percheman*, 32 U. S. 51, 86-7; *Ware* v. *Hylton*, 3 Dall. 199, 281; *Brown* v. *United States*, 8 Cranch 110; 2 Westlake: International Law 46, 47).

It is not the law of England, the domicile of these shareholders, to confiscate the private property, even of enemy aliens (*Stevenson* v. *Aktiengesellschaft etc. A. G.* (1918 H. L.) 239 244) nor is such doctrine recognized here (*Cummings* v. *Deutsche Bank*, 300 U. S. 115). This however is not the property of enemy nationals safeguarded only by custom among civilized nations and the usages of international law, it is the property of our friendly allies and as such it is within the protection of the Constitution of the United States (*Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489; *Hines* v. *Davidowitz*, 312 U. S. 52, 65, n. 14).

Nor may the undisputed powers of the President in the field of international relations be availed of as a cloak or pretext for the evasion of a fundamental constitutional guaranty. It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of exerting powers which have been granted to the United States (*McCullough* v. *Maryland*, 4 Wheat. 316, 423; *Linder* v. *United States*, 268 U. S. 5, 17). "To an end not within the terms of the Constitution, all ways are closed" (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 291). Even the war power is subject to applicable constitutional limitations (*Ex parte Milligan*, 4 Wall. 2, 121-127; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326; *United States* v. *Joint Traffic Assn.*, 171 U. S. 507, 571; *McCray* v. *United States*, 195 U. S. 27, 61; *United States* v. *Cress*, 243 U. S. 316, 326; *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146, 156; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88).

Petitioner concedes that local defenses to the merits of claims allegedly covered by the Litvinoff assignment are not barred thereby (brief, pp. 24-5; *Guaranty Tr. Co.* v. *United States*, 304 U. S. 126). If this be so, nothing can be

found in either the assignment or the President's actions surrounding its acceptance from which a destruction of the vested property rights of friendly aliens and the safeguards afforded them by our Constitution can be even remotely implied.[7] "It is to be assumed that the United States is incapable of bad faith" (*Great Falls Mfg. Co.* v. *Garland, Atty. General*, 124 U. S. 581, 599).

The assignment is not a treaty made by the President by and with the advice and consent of the Senate (Const. Art. II Sec. 2 Cl. 2) but a mere executive agreement only and not the supreme law of the land (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; *Altman & Co.* v. *United States*, 224 U. S. 583, 600-1). But even if it attained the dignity of a treaty, no treaty can authorize that which the Constitution forbids (*Asakura* v. *Seattle*, 265 U. S. 332, 341; *Thomas* v. *Gay*, 169 U. S. 264, 271; *Geofroy* v. *Riggs*, 133 U. S. 258, 267; *The Cherokee Tobacco*, 11 Wall. 616, 620-1; *Doe* v. *Braden*, 16 How. 635, 657).

Conclusion.

It is respectfully submitted that the decision below should be affirmed.

December 12, 1941.

ALBERT G. AVERY,
Attorney for Frederick H. Cattley, et al., British shareholders in the First Russian Insurance Company, as Amici Curiae.

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[7] See *United States* v. *Belmont*, 301 U. S. 324, 336-7; *Toduk* v. *Union State Bank*, 281 U. S. 449; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 143.